

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CAROLE SHELL)	
Claimant)	
)	
VS.)	
)	
BLISH-MIZE COMPANY)	
Respondent)	Docket No. 1,033,573
)	
AND)	
)	
VALLEY FORGE INSURANCE CO.)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the April 19, 2007, preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict. Jan L. Fisher, of Topeka, Kansas, appeared for claimant. James R. Hess, of Kansas City, Missouri, appeared for respondent and its insurance carrier.

The Administrative Law Judge (ALJ) found that "claimant did not suffer an accidental injury"¹ and denied her request for temporary total disability benefits and medical treatment.

The record is the same as that considered by the ALJ and consists of the transcript of the April 18, 2007, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.² Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted

¹ ALJ Order filed April 19, 2007.

² K.S.A. 44-534a.

by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.³

ISSUES

Claimant contends that she sustained personal injury by accident arising out of and in the course of her employment with respondent on January 5, 2007. She argues that the only opinion as to causation of her injuries is from Dr. Edward Prostic, whose report indicated that claimant's injury was work related. Claimant requests the Order of the ALJ be reversed and that the Board find she is entitled to temporary total disability benefits and medical treatment.

Respondent asserts that claimant did not suffer personal injury by accident arising out of and in the course of her employment at respondent. Respondent contends that the record shows that claimant admits her injury occurred after her shift at respondent while making copies at the house of a friend. Accordingly, respondent argues that claimant is not entitled to temporary total disability benefits or medical benefits and the Order of the ALJ should be affirmed.

The issue for the Board's review is: Did claimant suffer personal injury by accident arising out of and in the course of her employment with respondent?

FINDINGS OF FACT

Claimant has worked for respondent for 33 years. The last 10 to 15 years, she has worked in the receiving department. Her job requires her to unload trucks and put the merchandise in bins. The job now requires workers to be able to lift 100 pounds, but she was grandfathered in and has never had to lift anything weighing that much. She has lifted up to 80 pounds and says on an everyday basis she lifts items weighing 40 to 50 pounds.

In December 2006, claimant left work and went home. As she bent down to tie a shoe, her back popped and she felt a severe pain. The pain only lasted a couple of days. Claimant did not seek any medical treatment, did not miss any work, and did not take any medication for the pain.

While at work on Friday, January 5, 2007, claimant was removing some electric fence wire from a tote. As she tried to hold two rolls of wire, she twisted, heard a pop, and felt severe pain in her low back. She stopped working for a few minutes, and then continued to finish her shift. After work, claimant went to the home of a friend to run copies on a copy machine. She was sitting in a chair watching the copy machine, when the copy machine jammed. Claimant's friend started to unjam the copier. Claimant scooted back

³ K.S.A. 2006 Supp. 44-555c(k).

and started to stand up, her back popped, and she felt a severe pain in her legs and back. She could not stand up. She laid back in the chair with her legs straight out. She went numb and could not feel her legs. She laid in the chair for about 15 to 20 minutes until she felt able to stand up. After that, claimant's friend took claimant to see Dr. Aaron Hollis, a chiropractor. Dr. Hollis refused to treat her and told her to go to a hospital and get x-rays, which she did.

The Atchison Hospital emergency room records on claimant dated January 5, 2007, indicate under history that one month ago claimant "twisted back [while] tying her shoes & back popped—it repeated again today—she was unable to walk, move or feel her legs."⁴ The nurses' notes indicated that claimant stated "as she stood up & twisted to straighten up, she felt a 'pop' in her back."⁵ Claimant, however, contends she told the emergency room personnel that she was hurt lifting electric fence wire out of a tote. She also told the emergency room doctor about the incident in December 2006 when she was tying her shoe.

On Sunday, January 7, claimant called her supervisor, Kevin Zeit, respondent's receiving manager. She reported that she had been hurt and would come in and fill out an accident report. Claimant said she told Mr. Zeit that she had been hurt at work while lifting the electric fence wire. She also described the incident at her friend's house. Mr. Zeit testified that claimant told him she had been injured getting out of a chair on Friday evening while she was with some friends. He asked claimant if the injury was work related, and she told him that she had felt a twinge in her back when she was lifting something out of a tote on January 5.

Respondent sent claimant to see Dr. Wayne Wallace, the company physician, who sent claimant to physical therapy and gave her a 20-pound weight limitation. Respondent put claimant on light-duty work.

After two weeks of physical therapy, claimant's back had improved a little, although she was still having leg pain. She told Dr. Wallace that she thought she could return to work full time. On January 15, claimant returned to full time work but her symptoms returned. She had pains running down her left leg and had trouble walking. The pain would start in her left hip and go down her leg. She continued to work this way for about a month. Sometime during this time period, claimant was informed that respondent would pay for the two weeks of treatment she received from Dr. Wallace but would not pay for anything else.

On February 19, 2007, claimant was called into the office by her supervisor and the plant supervisor. She was told that her work productivity was slowing down and they

⁴P.H. Trans. (Apr. 18, 2007), Resp. Ex. C at 1.

⁵ *Id.*, Resp. Ex. C at 2.

noticed she was in pain. By that time, claimant was walking with a limp because of the pain in her left leg. Claimant was told by respondent to see a doctor, but no specific doctor was designated. Claimant said she would go to see a chiropractor, and respondent voiced no objection. Mr. Zeit testified he met with claimant and the plant supervisor to discuss her work performance. He had noticed claimant showing pain when she was working, and she was walking with an unnatural gait. Coworkers had reported that she was sitting down and not performing her job. At this point, Mr. Zeit did not think claimant's injury was work related but instead was the result of her standing up out of a chair. Also by this time, claimant's worker's compensation claim had been denied by respondent's insurance carrier.

After the February 19 meeting, claimant went to see Dr. Hollis, who gave her a lifting restriction of 40 pounds. Dr. Hollis released her to full duty on March 9, 2007. However, when claimant attempted to return to work, after about three hours she was told by her supervisor that she could not work until she took a physical capacity profile (PCP). Claimant complied with this request. However, she was not able to lift 100 pounds in the PCP, so she was not allowed to return to work.

On April 11, 2007, claimant was seen by Dr. Edward Prostic at the request of her attorney. Under the history segment, Dr. Prostic documented that claimant reported an injury to her low back after lifting a tote of electric fence wire. There is no mention in the report of the incident where her back popped after standing up from the chair at her friend's home. Dr. Prostic's report states: "On or about January 5, 2007, [claimant] sustained injury to her low back during the course of her employment."⁶ Dr. Prostic did not recommend any further treatment but indicated that claimant needed to be cautious in lifting, pushing, pulling, and bending and twisting at the waist.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.⁷ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁸

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

⁶ P.H. Trans. (Apr. 18, 2007), Cl. Ex. 6 at 2.

⁷ K.S.A. 2006 Supp. 44-501(a).

⁸ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

The phrase 'out of' employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises 'out of' employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises 'out of' employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase 'in the course of' employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.⁹

K.S.A. 2006 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record."

K.S.A. 2006 Supp. 44-508(g) finds burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his or her right to an award for compensation by proving all the various conditions on which his or her right to a recovery depends. This must be established by a preponderance of the credible evidence.¹⁰

ANALYSIS

Claimant is correct that Dr. Prostic relates claimant's back injury to her work activities on January 5, 2007. He does so, however, by history. And it appears the history Dr. Prostic considered may have been incomplete. Without proof that Dr. Prostic had and considered the complete history, Dr. Prostic's causation opinion cannot be given much weight. The accident that caused claimant to seek medical treatment did not occur at work. Instead, it happened after work while she was helping a friend make copies. Claimant has failed to establish a direct causal connection between her work, specifically the incident on January 5, 2007, where she was removing electric fence wire from a tote, and her current injury, disability, and need for medical treatment.

⁹ *Id.*

¹⁰ *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

CONCLUSION

Claimant suffered an accidental injury to her low back on January 5, 2007. But claimant has failed to prove her low back injury is the result of an accident that arose out of and in the course of her employment with respondent. Therefore, the ALJ's denial of preliminary benefits must be affirmed.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Bryce D. Benedict dated April 19, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June, 2007.

BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant
James R. Hess, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge